IMC FERTILIZER, INC.

IBLA 94-244 Decided February 10, 1997

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, cancelling potassium lease NMNM 90581.

Affirmed.

1. Administrative Authority: Generally–Administrative Procedure: Judicial Review–Board of Land Appeals–Mineral Leasing Act: Generally–Potassium Leases and Permits: Leases

A BLM decision cancelling a potassium lease will be affirmed on appeal when a judgment of a Federal District Court determines BLM was without authority to issue the lease and orders BLM to cancel the lease. Bona fide purchaser protection does not apply if the Department was without authority to issue the lease.

APPEARANCES: Charles C. High, Jr., Esq., El Paso, Texas, for IMC Fertilizer, Inc.; Harold J. Hensley, Esq., Gregory J. Nibert, Esq., and James A. Gillespie, Esq., Roswell, New Mexico, for Intervenor Pogo Producing Company; and A. J. Losee, Esq., Ernest L. Carroll, Esq., and Mary Lynn Bogle, Esq., Artesia, New Mexico, for Intervenor Yates Petroleum Corporation.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

IMC Fertilizer, Inc. (IMC) has appealed from a December 10, 1993, decision of the Acting State Director, New Mexico State Office, Bureau of Land Management (BLM), cancelling potassium lease NMNM 90581 (originally designated as NMNM 86719) issued to IMC on March 5, 1993.

Pogo Producing Company (Pogo) and Yates Petroleum Corporation (Yates) were the high bidders in a competitive potassium lease sale held by BLM on August 20, 1992. In a January 7, 1993, decision, BLM, stating it had rejected Pogo and Yates' high bid on January 5, 1993, accepted IMC's bid, awarded the lease to IMC, and enclosed lease forms for IMC to execute. The January 7, 1993, decision stated: "If the high bidder contests their high bid rejection to IBLA within 30 days in accordance with regulations under 43 CFR 4.400, BLM will put the lease in suspension under 43 CFR 3502.2-4

[sic], because the lease may not be successfully developed while under the climate of uncertainty of litigation. Such suspension waives minimum rental on undeveloped leases." 1/

Pogo and Yates filed a complaint in the United States District Court for the District of New Mexico (Pogo Producing Co. & Yates Petroleum Corp. v. Bureau of Land Management, Civ. No. 93-0213 JP) seeking a temporary restraining order, preliminary injunction and permanent injunction to prevent issuance of the lease. On February 23, 1993, prior to a hearing on Pogo and Yates' complaint, Pogo, Yates, and BLM entered into a stipulation approved by the Court in which BLM agreed not to issue the lease. United States District Judge James A. Parker subsequently filed a stipulated dismissal order on February 23, 1993, incorporating the stipulation and dismissing the action without prejudice.

On March 5, 1993, the Deputy State Director, Lands and Minerals, BLM, issued the lease effective April 1, 1993. On the same day he issued a decision suspending operations, also effective April 1, 1993. 2/ On August 10, 1993, in response to a motion filed by Pogo and Yates, United States District Judge Parker ordered BLM to show cause why it had not violated the terms of the stipulation entered into on February 23, 1993. Prior to the hearing on the show cause order, Pogo, Yates, and BLM agreed to settle the matter. A stipulated judgment against BLM was entered by the Federal District Court on October 28, 1993. The stipulated judgment states in pertinent part:

> 1. The Defendant New Mexico State Office, * * * (BLM), breached the terms of the February 23, 1993 Stipulation between Pogo and Yates and the Defendant by issuing Potassium Lease NMNM 90581 on March 5, 1993.

1/ Presumably BLM intended to cite 43 CFR 3503.2-4. Pogo and Yates appealed BLM's Jan. 5, 1993, rejection of their high bid; their appeal was docketed as IBLA 93-246. For our decision on their appeal, see Pogo Producing Co., 138 IBLA 142 (1997).

2/ This decision stated in part:

"In accordance with Section 39 of the Mineral Leasing Act of 1920, (as amended), 30 U.S.C. 209, the regulation in 43 CFR 3503.3, and as specified in the lease terms, [BLM] suspends potassium lease NMNM 90581. * * * The lease was awarded to the second high bidder under 43 CFR 3535-3(f) [sic] after rejection of the high bid under 43 CFR 3535-3(f) [sic] and 43 CFR 3535.6. The high bidder has appealed the rejection to IBLA. The high bidder has indicated to us that they will also appeal the lease award to IBLA. We believe IMC may not be able to successfully operate the lease from a financial standpoint or with regard to the interests of conservation while the lease is under litigation. The lease shall be suspended as of April 1, 1993, and the suspension will remain in effect for the duration of those conditions preventing operation of the lease."

2. The Defendant violated the February 23, 1993 Stipulation. The Defendant submits that the breach was inadvertent, as shall be further explained in the letter submitted pursuant to paragraph 1, below.

* * * * * * *

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. Within 10 days of entry of this Stipulated Judgment the Defendant BLM will issue a written statement, explaining in detail the circumstances surrounding and the cause for the violation of the February 23 Stipulation and Order. [3/]

* * * * * * *

3. Within 10 days of entry of this Stipulated Judgment the Defendant will take such steps as are necessary to revoke, cancel and terminate the issuance of Potassium Lease NM-90581 to IMC Fertilizer, Inc. on March 5, 1993, including, but not limited to, a joint motion with Plaintiffs to remand IBLA Appeal No. 93-521, attaching thereto a copy of this Stipulated Judgment. [4/]

4. Upon receipt of satisfactory evidence that BLM has taken the steps outlined above, Pogo and Yates will move, if necessary, to dismiss IBLA Appeal No. 93-521.

5. Defendants shall not issue a Potassium lease for the lands covered by Potassium Lease NMNM-86719 to IMC or anyone else until Pogo and Yates have exhausted their administrative appeals and any other legal remedies with respect to the rejection of their bid on Potassium Lease NMNM-86719.

3/ In a Nov. 8, 1993, letter to the Assistant U.S. Attorney, BLM's Deputy State Director explained:

"Issuance occurred because BLM technical and management personnel did not fully understand the Dismissal Order. The Order stated in part '. . . the civil action is hereby dismissed without prejudice.' We interpreted this as meaning all legal action on this manner [sic] ceased and we could proceed with the issuance. The Department of the Interior and the Department of Justice counsel also were not aware of the distinction between awarding and issuing a lease. At the time the Dismissal Order was issued we had awarded but not issued the Lease. Not being aware of the distinction added to the confusion. We issued and suspended the Lease believing we were in compliance with the Dismissal Order, and believing that action was acceptable to all parties."

4/ In response to a joint motion for remand filed by BLM, Pogo, and Yates on Nov. 22, 1993, we dismissed IBLA 93-521 by order dated Nov. 26, 1993.

Based on the stipulated judgment and on 43 CFR 3509.4-2(c), BLM issued the December 10, 1993, decision cancelling the lease issued to IMC. 43 CFR 3509.4-2(c) provides: "If a lease is issued improperly, it shall be subject to administrative cancellation."

IMC timely appealed and sought a stay of BLM's December 10, 1993, decision. We denied the petition for stay on February 25, 1994, and granted Pogo and Yates' petition to intervene on April 5, 1994.

On appeal, IMC states that it was neither informed of nor given an opportunity to appear and participate in the Federal District Court litigation that led to the October 28, 1993, stipulated judgment. IMC acknowledges that 43 CFR 3509.4-2(c) authorizes administrative cancellation of a lease but argues BLM may not cancel a lease "to the extent that such action adversely affects the title or interest of a bona fide purchaser" under 43 CFR 3509.4-3(a). Although 43 CFR 3509.4-3(a) states that purchasers are charged with constructive knowledge of all regulations and BLM records pertaining to a lease and the land it covers, this does not include "private agreements made by the BLM with parties in litigation," IMC argues (Statement of Reasons at 3). Because IMC was a bona fide purchaser and because no showing was made that it held the lease in violation of the Mineral Leasing Act or applicable regulations, it was error for BLM to cancel the lease, IMC concludes. IMC requests that BLM's decision be reversed and its lease reinstated. Id. 5/

Pogo and Yates argue IMC is not a bona fide purchaser. "To be a bona fide purchaser, one must buy from a party who has authority to sell and the purchaser must know of nothing which would put the seller's authority in doubt. Neither case is true in this instance" (Response at 3). BLM did not have authority to issue the lease after the Federal District Court's February 23, 1993, stipulated dismissal order incorporating BLM's agreement not to issue the lease. They cite Petrolex 84-1 Limited, 118 IBLA 372 (1991), Elaine Wolf, 113 IBLA 364 (1990), and Walter S. Fees, Jr., 110 IBLA 377 (1989), for the Secretary's authority to cancel any lease issued contrary to law due to the inadvertence of his subordinates. (BLM's Nov. 8, 1993, letter, supra note 3, makes clear BLM inadvertently issued the lease, Pogo and Yates observe.) These cases apply 30 U.S.C. § 184(h)(2) (1994), the statutory basis for 43 CFR 3509.4-3(a). In Hanes M. Dawson, 101 IBLA 315, 319 (1988), we stated:

> This provision provides protection to "good faith purchasers whose predecessors in interest were in violation of some

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5/ IMC also requested the case be assigned for a hearing. Because we find no material issues of fact the resolution of which would affect the outcome of this appeal, IMC's request is denied. See Yates Petroleum Corp., 131 IBLA 230, 235 (1994).

> provision of the act, such as acreage limitation provisions, and not for protection of purchasers of leases erroneously issued for lands not subject to noncompetitive leasing." Oil Resources, Inc., 14 IBLA 333, 337 n. 1 (1974). Thus, the Board has consistently held that where the lease is subject to cancellation because BLM lacked authority to issue it, the bona fide purchaser protection afforded by 30 U.S.C. § 18[4](h)(2) (19[94]) does not apply.

Finally, Pogo and Yates argue IMC "has consistently been on notice of the fact that BLM had no authority to issue a lease for the subject lands to IMC" (Response at 6). They request that we affirm BLM's decision.

[1] The issue presented for decision is whether BLM properly cancelled the lease as required by a judgment of the United States District Court for the District of New Mexico. Of course, we exercise no supervisory authority or appellate jurisdiction over proceedings pending in the district courts of the United States. Richard W. Taylor, 119 IBLA 310, 316 (1991); Jim D. Wills, 113 IBLA 396, 400 n.4 (1990). Under the law of the case doctrine, a court is precluded from re-examining an issue previously decided by the same court or a higher appellate court in the same case. A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1418 (9th Cir.), cert denied, 476 U.S. 1117 (1986); United States v. Maybusher, 735 F.2d 366, 370 (9th Cir. 1984), cert. denied, 469 U.S. 1110 (1985). An inferior court has no power to deviate from the mandate issued by an appellate court.

This rule is equally applicable to the duty of an administrative agency, such as this Board, to comply with the mandate of a reviewing court. Federal Power Commission v. Pacific Co., 307 U.S. 156, 160 (1939); In re Wella A.G., 858 F.2d 725, 728 (Fed. Cir. 1988); Vern T. Weiss, 128 IBLA 119, 123 (1993), appeal filed, Civ. No. A-94-072 (D. Alaska Feb. 25, 1994). On remand, an administrative agency is bound to apply the legal principles laid down by the court. Chicago & North Western Transportation Co. v. United States, 574 F.2d 926, 930 (7th Cir. 1978) (citing FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940)); Valdez v. Schweicker, 575 F. Supp. 1203, 1204 (D. Colo. 1983); Vern T. Weiss, supra. The law of the case doctrine, while not extending to every issue raised in litigation, does extend to issues actually decided either expressly or by necessary implication. Hester v. International Union of Operating Engineers, 941 F.2d 1574, 1581, n.9 (11th Cir. 1991), and cases cited; Vern T. Weiss, supra.

To the extent that IMC takes issue with the judgment of the U.S. District Court for the District of New Mexico ordering BLM to cancel the lease issued to IMC, IMC's remedy does not lie with this Board. Regardless of whether IMC was a party to those proceedings, the fact remains that the Department was a party and the issue of whether BLM properly issued the lease pending appeal of the high bid rejection was actually decided by the New Mexico Federal District Court. Absent a decision setting aside the

judgment, we are bound by the Court's determination that BLM was without authority to issue the lease.

Bona fide purchaser protection does not apply if the Department was without authority to issue the lease, as determined by the Court. Petrolex 84-1 Limited, supra; Elaine Wolf, supra; Hanes M. Dawson, supra. That appellant might have otherwise qualified as a bona fide purchase does not vest the Department with authority that it otherwise lacks.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Will A. Irwin
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge